Filed in First Judicial District Court
10/20/2016 3:33:03 PM
Carver County, MN

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF CARVER **FIRST JUDICIAL DISTRICT**

Court File No. 10-PR-16-46

In re Estate of Prince Rogers Nelson, Decedent.

REPLY MEMORANDUM OF LAW OF COREY SIMMONS RESPONSIVE TO MEMORANDUM OF LAW OF NON-EXCLUDED HEIRS

Corey Simmons has submitted his motion requesting that he be included in the class of persons this Court has identified as applicants claiming to be descendants of Duane J. Nelson, Sr.[1] This Court's Amended Scheduling Order sets an oral argument proceeding for October 21, 2016 on the issue of whether Brianna Nelson, V.N., and now Corey Simmons could be considered heirs of this estate as a matter of law. The Court has determined that for the purpose of the memoranda of law and for the oral argument, the facts shall be considered in a light most favorable to Brianna Nelson, V.N., and Corey Simmons. The Court further indicates that as a result of that hearing, the Court may vacate the requirement of its July 29th Order that Brianna Nelson, V.N., John Nelson, Norrine Nelson, Sharon Nelson, and Tyka Nelson undergo genetic testing pursuant to the terms of the Genetic Testing Protocol.

Based upon the Amended Scheduling Order, it would also appear that if the Court finds that Brianna Nelson, V.N., and/or Corey Simmons have claims to be heirs as a matter of law, then motions *in limine* must be served and filed no later than November 14, 2016 for a hearing on November 18, 2016, followed by an evidentiary hearing beginning on November 30, 2016 and continuing until it is completed (or until December 2, 2016) regarding the claims of Brianna Nelson, V.N., and Corey Simmons.

Omarr Baker, Alfred Jackson, John Nelson, Norrine Nelson, Sharon Nelson, and Tyka Nelson (the "Heirs") e-served and e-filed their "Non-Excluded Heirs' Memorandum of Law in Response to Brianna Nelson's and V.N.'s Legal Basis for Heirship" (the "Heirs Memorandum") on October 17, 2016. Corey Simmons hereby initially replies to the Heirs' Memorandum reserving the right to supplement his response if the Heirs Memorandum was filed and served for the November 14th hearing.

[1]"Order Regarding Genetic Testing Protocol And Heirship Claims Following The June 27, 2016 Hearing And Judgment", filed July 29, 2016 (hereinafter the "July 29th Order"); and Court's "Amended Scheduling Order Regarding The Claims Of Brianna Nelson And V.N. And Corey Simmons To Be Heirs Of The Estate", filed October 3, 2016 (hereinafter the "Amended Scheduling Order").

Filed in First Judicial District Court
10/20/2016 3:33:03 PM
Carver County, MN

The Heirs' Memorandum requests an order from this Court to find that Brianna Nelson and V.N. are not heirs of Prince Rogers Nelson. *See*, Heirs' Memorandum, pp. 1 and 19. They do not mention Corey Simmons' claims. The Heirs' Memorandum further requests that the Court deny any further discovery or evidentiary hearing. Under Rule 115.01(a)(1) Minn. Gen. R. Prac., the Heirs' Memorandum is a dispositive motion because it seeks to dispose of all of the claims of Brianna Nelson and V.N. To that extent, the undersigned requests that the arguments contained in the Heirs' Memorandum be procedurally confined to the hearing on November 18, 2016 for motions "*in limine*" as directed by the Court's Amended Scheduling Order and allow the undersigned to supplementally respond to them in due course.

Should the Heirs raise arguments in the Heir's Memorandum on October 21st, our objection would be that their service of the Heirs' Memorandum, on October 17th, was not scheduled for hearing on October 21, 2016 and was not timely served as required by Under Rule 115.01(b) Minn. Gen. R. Prac. and Mr. Simmons should have more time in which to fully respond.

COREY SIMMONS' CLAIMS

Corey Simmons' position is similar to that of Brianna Nelson and V.N. Due to a lack of presumptions under the Parentage Act with regard to Corey Simmons' relationship with his father, Duane Joseph Nelson, Sr., he must prove two connections. He chooses to seek genetic testing of the relationship with his father, Duane Joseph Nelson, Sr. and reserves the right to also seek to prove it by clear and convincing evidence under *Palmer* and the doctrine of equitable adoption as well. Additionally, he also seeks to prove the father-son relationship between his father, Duane Joseph Nelson, Sr. and John L. Nelson by clear and convincing evidence pursuant to *Palmer* and the doctrine of equitable adoption.

A. Minnesota Probate Code Regarding the Determination of Heirs

Minn. Stat §524.1-103 expressly states that, "Unless displaced by the particular provisions of this chapter, the principles of law and equity supplement its provisions." This not only makes clear that prior and future principles of law and equity can be included, but that the statutory provisions are not exclusive, unless they state expressly that they are.

Minn. Stat. §524.2-122 expressly states that the Minnesota Probate Code does not affect the doctrine of equitable adoption, clearly indicating the supplemental applicability of case law to issues of intestate succession. It further establishes that the principle of the common law doctrine of equitable adoption is *not displaced* by any particular provisions of the Probate

Filed in First Judicial District Court
10/20/2016 3:33:03 PM
Carver County, MN

Code. Therefore, an understanding of Minnesota's law on inheritance by intestacy requires analysis of the Probate Code, any pertinent case law which *supplements* it, and the doctrine of equitable adoption.

Until the Probate Code's amendments in 2010, Minn.Stat. §524.2-114 (2), "Meaning Of Child And Related Terms", provided two concepts. First, that a person is the child of the person's parents regardless of the marital status of the parents. Second, this statute also provided that "the parent and child relationship **may** be established under the parentage act, sections 257.51 and 257.74." [emphasis added]

In *Estate of Palmer,* 658 N.W.2d 197,199 (Minn. 2003), the Minnesota Supreme Court held that the District Court and Court of Appeals both correctly interpreted Minn.Stat. § 524.2–114(2) as permitting, but not requiring, that parentage in a probate proceeding be determined in accordance with the dictates of the Parentage Act. *Id. at 199, Citing, In re Estate of Palmer,* 647 N.W.2d 13, 16 (Minn.App.2002). This means that the Parentage Act is not the exclusive procedure and law for determining parentage for intestate succession.

> For purposes of intestate succession, a parent-child relationship may be established by clear and convincing evidence regardless of the time limitation imposed by the Parentage Act. Respondent, having established his parent-child relationship to Palmer by clear and convincing evidence, is entitled to inherit as his descendent. Id., at 199.

The Palmer Court also held that "had the legislature wanted parentage for probate purposes to be determined exclusively under the Parentage Act, it could have so provided." *Id.*

In their analysis, the Supreme Court considered, adopted and applied the rationale for this interpretation from the New Jersey Supreme Court decision in *Wingate v. Estate of Ryan,* 149 N.J. 227, 693 A.2d 457, 465 (1997). In *Wingate,* a 31-year-old claimant sought to prove parentage for the purposes of intestate succession under New Jersey's Parentage Act, but it provided a 23-year statute of limitations. In *Wingate,* the court held that the New Jersey Parentage Act's statute of limitations did not bar the probate claim. The *Palmer* Supreme Court, quoting the *Wingate* Supreme Court stated:

> [T]he Parentage Act and the Probate Code are independent statutes designed to address different primary rights. The purpose of the Parentage Act is to establish "the legal relationship … between a child and the child's natural or adoptive parents, incident to which the law confers or imposes rights, privileges, duties, and obligations."

Filed in First Judicial District Court
10/20/2016 3:33:03 PM
Carver County, MN

> Child support is the major concern under the Parentage Act. The purpose of the Probate Code, on the other hand, is to determine the devolution of a decedent's real and personal property. The different purposes the two statutes serve, help to explain why the Legislature contemplated different periods of limitations for filing claims under those statutes.(citations omitted)

The Palmer Court applied *Wingate* to explain it's own conclusion about the legislative intent expressed in Minn.Stat. § 524.2–114(2):

> The New Jersey court's rationale is applicable to our law. The distinct purposes of probate and family law justify the [Minnesota] legislature's decision not to make the Parentage Act the sole means of establishing paternity for the purposes of probate.

Palmer, 658 N.W.2d 197, 200.

The *Palmer* decision is therefore not limited to reliance upon interpretation of the actual words of a now-repealed statute (by the overhaul of the Probate Code), but they also determined the Minnesota legislative intent to *not* make the Parentage Act the sole means of establishing paternity.

The Heirs' Memorandum contends that Brianna Nelson and V.N. have no support in the law because Minn.Stat. § 524.2–114(2) is repealed and the *Palmer* case fails without it. This view is misguided, since the very holding of *Palmer* includes a finding of legislative intent to not make the Parentage Act the sole procedure and basis for ascertaining heirs under the Probate Code. It is not even the only case. For the principles of the non-exclusivity of the Parentage Act is also followed and reiterated in *In re Estate of Jotham*, 722 N.W.2d 447, 453 (2006). The *Jotham* Court held that the Supreme Court needed to clarify "when it is appropriate for a probate court to use a Parentage Act presumption to establish paternity for intestacy purposes and when the alternative method described in *Palmer* -- clear and convincing evidence of paternity -- may be employed. This highlights that the *Palmer* alternative of proving paternity through clear and convincing evidence is not derived merely from Minn.Stat. § 524.2–114(2), but rather from the principles of law and equity, allowing claiming heirs to pursue adjudication of their identity, is evident as a matter of legislative intent.

The Parentage Act itself, in Minn.Stat. §§257.7, subd. 3 and 257.58, Subd. 2, further reflect the same legislative intent not to limit how to present a claim of heirship to only one procedure:

Filed in First Judicial District Court
10/20/2016 3:33:03 PM
Carver County, MN

> Subd. 3.Action regarding child with no presumed father under section 257.55.
>
> An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under section 257.55 may be brought by the child….
>
> Subd. 2.Heirship.
> Section 257.57 and this section do not extend the time within which a right of inheritance or a right to a succession may be asserted beyond the time provided by law relating to distribution and closing of decedents' estates or to the determination of heirship, or otherwise.

In 2010, Minn.Stat. §§524.2-114 was entirely deleted from the Minnesota Probate Code as part of a large-scale revamping of the Code to incorporate 2008 model code enactments. Although the specific language of this statute which the *Palmer* Supreme Court interpreted was repealed, the repeal was part of a model code overhaul. There is no evidence that it was repealed on its merits. In addition, the 2010 overhaul of the Probate Code in Minnesota still retained the "equitable principles supplement" statute (Minn. Stat §524.1-103). In addition, the 2010 amendments added Minn. Stat §524.1-122, expressly preserving the doctrine of equitable adoption.

Further, another new section, Minn.Stat. §§524.2-117, was also added in 2010, providing that a parent-child relationship exists between a child and the child's "genetic parents." Yet another addition, Minn.Stat. §524.2-116, was added: "…*if a parent-child relationship exists* **or** is established under this part, the parent is a parent of the child and the child is a child of the parent for the purpose of intestate succession." [emphasis added] As argued by Brianna Nelson and V. N. through the submission of the "Revised Declaration of Susan N. Gary", dated October 14, 2016, we agree that Minn.Stat. §524.2-116 provides that the Minnesota Probate Code provides that the Parentage Act is not intended to be the exclusive way to establish a parent-child relationship. Even without *Palmer*, the Probate Code provides for a court determined parent-child relationship through prove with clear and convincing evidence and expressly protects the doctrine of equitable adoption.

B. Minnesota Parentage Act

Minn.Stat. §257.54 states how a parent and child relationship is established under the Act, providing that:"…(b) the biological father may be established under sections 257.51 to 257.74 or 257.75. Once again, the permissive "may" is used and the analysis of *Palmer* and *Jotham*

Filed in First Judicial District Court
10/20/2016 3:33:03 PM
Carver County, MN

in that regard should be persuasive to the conclusion that this indicates that the Procedure in the Parentage Act is both permissive and non-exclusive regarding proof of heirship in estate proceedings.

Minn.Stat. §257.57, subd. 3 of Minnesota's Parentage Act provides that an action to determine the existence of the father and child relationship with respect to "a child who has no presumed father" under section Minn.Stat. §257.55 may be brought by the child.

Any arguments that have to do with the repeal of Minn.Stat. § 524.2–114(2) does not withstand an examination of the Minnesota Legislature's intentions, and that the changes of 2010 were merely rearrangements, retainning principles of equity and the permissive use of other procedures of proof. The analysis and holdings of *Palmer* and *Jotham* are common law supplements to what is stated in the Probate Code. They are not in conflict with the current statutory language and therefore are not "displaced" by the 2010 Code changes. The removal of a statutory provision as part of general "upgrade" of Minnesota's Probate Code can hardly be used to support the idea that Minnesota's legislature intended to repeal Minn. Stat. §524.2-114(2) on its merits.

C. Heirs' Reliance on *Witso*

Footnote 10 of the Heirs' Memorandum claims that *Witso v. Overby,* 627 N.W.2d 63 (Minn.2001), held that the Parentage Act "provides the exclusive bases for standing to bring an action to determine paternity." *Citing Witso*, at 65-66. This very assertion was refused by the Minnesota Court of Appeals in *Palmer, 647 N.W.2d 13, 16, footnote 4:*

> "Appellant also relies on *Witso v. Overby,* 627 N.W.2d 63 (Minn.2001) to argue that the Parentage Act is the exclusive means of establishing paternity. Her reliance is misplaced. *Witso* concerns a father's standing to bring an action to establish paternity, not the interrelationship between the Probate Code and the Parentage Act."

STANDARDS FOR RULING ON A DISPOSITIVE MOTION

The Heirs' Memorandum is a dispositive motion. As in a summary judgment motion, it is inappropriate for the Court to grant their motion when reasonable persons might draw different conclusions from the evidence presented. Illinois Farmers Ins. Co. v. Tapemark Co., 273 N.W.2d 630, 634 (Minn. 1978).

The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist. See Nord v. Herreid, 305

Filed in First Judicial District Court
10/20/2016 3:33:03 PM
Carver County, MN

N.W.2d 337, 339 (Minn. 1981) (citing Anderson v. Twin City Rapid Transit Co., 250 Minn. 167, 186, 84 N.W.2d 593, 605 (1957)).

The court must not weigh the evidence on a motion for summary judgment. Fairview Hosp. & Health Care Servs. v. St. Paul Fire & Marine Ins. Co., 535 N.W.2d 337, 341 (Minn. 1995).

A moving party is entitled to summary judgment only when "there are no facts in the record giving rise to a genuine issue for trial as to the existence of an essential element of the nonmoving party's case." *Nicollet Restoration, Inc. v. City of St. Paul,* 533 N.W.2d 845, 847-48 (Minn. 1995) see also Lubbers v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995) (summary judgment mandatory for the defendant only when "the record reflects a complete lack of proof on an essential element of the plaintiff's claim").

THE HEIRS' EVIDENTIARY OBJECTIONS

The Heirs Memorandum makes numerous evidentiary objections. First claiming there is no factual support for Brianna Nelson and V.N.'s claims, they proceed to make numerous evidentiary objections in an effort to suppress the many factual events and documents Brianna Nelson and V.N. have to present. A dispositive motion is not the place for assertion of evidentiary claims if counsel is well aware of the exceptions to the rules.

D. Declarations by Deceased Persons

There is no evidentiary rule prohibiting the admission of statements made by a decedent. The Minnesota Supreme Court long ago, in *In Re Forsythe's Estate,* 221 Minn. 303, 22 N.W.2d 19,25(1946) discussed the involved evidentiary issues surrounding the former "Deadman's Statute" of Minnesota Statute § 595.04, which had been repealed and replaced by Minnesota Rules of Evidence, Rule 617, which now states: "A witness is not precluded from giving evidence of or concerning any conversations with, or admissions of a deceased or insane party or person merely because the witness is a party to the action or a person interested in the event thereof." The rationale for abolishing the "Deadman's Statute" is set out in detail *In Re Estate of Lea,* 301 Minn. 253, 222 N.W.2d 92 (1974).

E. Ancient Instruments

The concerted effort to seek suppression of statements and exhibits by the Heirs' Memorandum simply ignores the Rules of Evidence and the exceptions to hearsay. While claiming there are no facts to support the assertions of Brianna Nelson, V.N. and presumably Corey Simmons' claims to be heirs, the Heirs' Memorandum asks the Court to make rulings on evidence it is not supposed to make in determining the dispositive motion of the Heirs.

Filed in First Judicial District Court
10/20/2016 3:33:03 PM
Carver County, MN

Minn. Rul. Ev., Rule 803.Hearsay Exceptions include but are not limited to:

- Rule 804. Declarant Unavailable.
  (a)Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:
  ...
  (4) is unable to be present or to testify at the hearing because of death….
- Rule 804 (b)Hearsay exceptions.
  The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
  (1) Former testimony.
  (4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated;

Several of the most important persons in this case who knew of relationships or the lack thereof are deceased. Counsel for the Heirs asserts that court documents signed by Lorna Nelson or her attorneys identifying Duane J. Nelson, Sr. as her brother are inadmissible, yet they also argue that the court documents signed by Prince Rogers Nelson in the probate of his father's estate should be considered and are "reliable".

These evidentiary arguments are fit for discussion during the hearing on the merits, not during a dispositive motion.

October 20, 2016

Attorneys for Corey Simmons

Dammeyer Law Firm, P.A.

/s/ Eric C. Dammeyer

Eric C. Dammeyer (#134375)
3800 American Blvd. West, Suite 1500
Bloomington, MN 55431
952.927.7060
eric@dammeyerlaw.com
Fax 952.232.6263

Lehner Law Office, LLC

/s/ Andrew M. Lehner

Andrew M. Lehner (#388061)
1069 S. Robert St, Suite 100
West St. Paul, MN 55118
651.222.9829
andy@lehnerlawoffice.com
Fax 651.222.1122